

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARLINDA K. JOHNSON,

Plaintiff,

v.

CITY OF SEATTLE, et al.,

Defendants.

CASE NO. C05-261JLR

ORDER

**I. INTRODUCTION**

This matter comes before the court on Defendants' Motion for Judgment on the Pleadings Dismissing All Claims (Dkt. # 11) and Plaintiff's Motion to Enlarge Time Pursuant to FRCP 6(b) (Dkt. # 15). Having considered all of the papers filed in connection with the motions and having heard oral argument, the court GRANTS Defendants' motion to dismiss and DENIES Plaintiff's motion for enlargement of time.

**II. BACKGROUND**

On November 4, 2004, Plaintiff Marlinda K. Johnson filed a complaint with King County Superior Court<sup>1</sup> alleging that she suffered physical and emotional injuries during

---

<sup>1</sup>Defendants removed Plaintiff's case to this court after Plaintiff amended her complaint to state a claim under 42 U.S.C. § 1983.

1 an altercation with the Seattle Police Department exactly three years prior (on November  
2 4, 2001). Specifically, Plaintiff alleged that the arresting officers violently pulled her out  
3 of her car and later slammed her head into a cement wall, injuring her head and ankle and  
4 causing her emotional distress. Although Plaintiff filed suit in November 2004, her  
5 counsel waited until February 3, 2005 to serve Defendant City of Seattle due to his trial  
6 and teaching schedule. By filing the present motion, Defendants seek dismissal of  
7 Plaintiff's claims, arguing primarily that Plaintiff's case is time-barred under  
8 Washington's statute of limitations. Plaintiff opposes dismissal and asks the court to  
9 extend the deadline allowing service on the Defendants outside the 90-day period tolling  
10 the statute of limitations.  
11

### 12 III. DISCUSSION

#### 13 A. Legal Standard

14 When considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court  
15 construes the complaint in the light most favorable to the non-moving party. Livid  
16 Holdings Ltd. v. Salomon Smith Barney, Inc., 403 F.3d 1050, 1055 (9th Cir. 2005). The  
17 court must accept all well-pleaded facts as true and draw all reasonable inferences in  
18 favor of the plaintiff. Wyler Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658,  
19 661 (9th Cir. 1998). Dismissal for failure to state a claim is appropriate when it appears  
20 beyond doubt that the non-moving party can prove no set of facts in support of its claim.  
21 Manshardt v. Fed. Judicial Qualifications Comm., 401 F.3d 1014, 1016 (9th Cir. 2005).  
22 The court will dismiss a complaint for failure to comply with the statute of limitations  
23 only if the plaintiff cannot demonstrate that the statute was tolled under a liberal reading  
24 of the complaint. Cervantes v. City of San Diego, 5 F.3d 1273, 1275 (9th Cir. 1993).  
25  
26  
27  
28

**B. Defendants' Motion for Judgment on the Pleadings Dismissing All Claims**

Defendants seek dismissal of Plaintiff's case on multiple grounds: (1) Plaintiff's claims against Defendants are time-barred, (2) Plaintiff has failed to allege that a particular policy or custom of Defendant City of Seattle violated her constitutional rights, (3) Plaintiff failed to personally serve the individual Defendants and thereby deprived this court of jurisdiction, and (4) Defendant Seattle Police Department is exempt from suit under Washington law. Given the court's resolution of Defendants' statute of limitations argument, the court refrains from considering Defendants' other grounds for dismissal.

Although the parties dispute whether Washington's two- or three-year statute of limitations governs this case, the threshold issue for the court is whether Plaintiff tolled the statute of limitations and not what particular time period applied.<sup>2</sup> Even assuming the three-year statute of limitations period governs this case, the court finds that Plaintiff's failure to serve the Defendants within 90 days of filing the complaint failed to toll the three-year statute of limitations. In Washington, RCW 4.16.170 governs when the statute of limitations is tolled, providing in relevant part:

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication *within ninety days* from the date of filing the complaint. . . . If following service, the complaint is not so filed, or following

---

<sup>2</sup>Plaintiff's complaint alleges negligence and civil rights violations which are governed by a three-year statute of limitations under RCW 4.16.080. Defendants argue that Plaintiff's claims are actually disguised intentional torts claims and therefore subject to Washington's two-year statute of limitations under RCW 4.16.100. Regardless, the court need not resolve this dispute given Plaintiff's failure to either (1) serve the Defendants within the two-year statute of limitations period (expiring November 4, 2003) or (2) toll the three-year statute of limitations period by serving Defendants within 90 days of filing suit under RCW 4.16.170.

1 filing, service is not so made, the action shall be deemed to not  
2 have been commenced for purposes of tolling the statute of  
limitations.

3 Id. (emphasis added). Therefore, filing a complaint alone is insufficient to commence an  
4 action for the purpose of tolling the statute of limitations. “If the additional step (service  
5 after filing or filing after service) is not accomplished within 90 days, the action is treated  
6 as if it had not been commenced.” Wothers v. Farmers Ins. Co., 5 P.3d 719, 721 (Wash.  
7 Ct. App. 2000). The statute of limitations is only tolled if both acts are completed within  
8 90 days. Margetan v. Superior Chair Craft Co., 963 P.2d 907, 909 (Wash. Ct. App.  
9 1998). If the two requirements fail to occur within the specified time frame, the suit is  
10 considered a nullity. Adkinson v. Digby, 660 P.2d 756, 757 (Wash. 1983).

12 Here, Plaintiff filed her initial complaint on November 4, 2004 and her counsel  
13 admits to waiting 91 days to serve the complaint on one of the Defendants (counsel only  
14 served Defendant City of Seattle). Franklin Decl. at 1. By not serving Defendants within  
15 90 days as required by RCW 4.16.170, Plaintiff failed to toll the applicable statute of  
16 limitations and the three-year limitation period expired as if the action never commenced.  
17 Wothers, 5 P.3d at 721; see also Margetan, 963 P.2d at 909 (explaining that 90-day  
18 provision of RCW 4.16.170 tolls, rather than extends, the statute of limitations).<sup>3</sup>  
19 Consequently, the court DISMISSES Plaintiff’s complaint as time-barred by the statute of  
20 limitations.  
21

22 **C. Plaintiff’s Motion to Enlarge Time Pursuant to Fed. R. Civ. P. 6(b)**  
23

24  
25 <sup>3</sup>Plaintiff’s additional argument that her incarceration tolled the statute of limitations  
26 for two days under RCW 4.16.190 misses the point. Even assuming Plaintiff’s incarceration  
27 tolled the statute of limitations until November 6, 2004 (instead of November 4, 2004), the  
28 court would still consider Plaintiff’s case a nullity because her counsel failed to effect service  
within 90 days of filing the complaint. See Wothers, 5 P.3d at 721 (holding failure to file and  
serve the complaint within 90 days renders the commencement of an action a nullity).

1 To cure the statute of limitations problem, Plaintiff asks the court, pursuant to Fed.  
 2 R. Civ. P. 6(b), to allow service on the Defendants after the 90-day deadline.<sup>4</sup> Under  
 3 Fed. R. Civ. P. 6(b)(2), the court may extend the time period for an action to be  
 4 completed if the “failure to act was the result of excusable neglect.” While the Supreme  
 5 Court has characterized excusable neglect as a “somewhat ‘elastic concept,’” the Court  
 6 has suggested that “inadvertence, ignorance of the rules, or mistakes construing the rules  
 7 do not usually constitute ‘excusable neglect.’” Pioneer Inv. Servs. Co. v. Brunswick  
 8 Assoc. Ltd. P’ship, 507 U.S. 380, 392 (1993).<sup>5</sup>

10 Here, Plaintiff missed the deadline for service because counsel “was looking at the  
 11 passing of three months and not just the 90 days” and because of counsel’s “trial and  
 12 teaching schedule.” Franklin Decl. at 1-2. Plaintiff allegedly filed the complaint on  
 13 November 4, 2004 to preserve the claim with the intention of later amending and serving  
 14 it. Yet, a plaintiff’s desire to amend the complaint before serving the defendant, along  
 15

---

17 <sup>4</sup>At oral argument, Defendants argued for the first time that Fed. R. Civ. P. 6(b)(2)  
 18 does not permit federal courts to enlarge time periods established by statutes, relying on  
 19 Hammons v. Int’l Playtex, Inc., 676 F. Supp. 1114, 1118 (D. Wyo. 1988), vacated, 872 F.2d  
 20 963 (10th Cir. 1989). In response, Plaintiff’s counsel directed the court to consider an earlier  
 21 case where another court in this district permitted counsel to serve the remaining defendants  
 22 in the action beyond the time period established by Fed. R. Civ. P. 4. Plaintiff’s reliance on  
 23 the suggested case, Estate of Shaddox v. Yi, No. C01-0281L, is misplaced given the different  
 24 factual scenario presented by the case at bar, including Plaintiff’s failure to serve *any*  
 Defendant in this case prior to the expiration of the statute of limitations. The court is  
 unpersuaded by Plaintiff’s analogy to Shaddox and refrains from determining whether Fed. R.  
 Civ. P. 6(b)(2) provides the relief Plaintiff seeks in light of Plaintiff’s failure to demonstrate  
 excusable neglect.

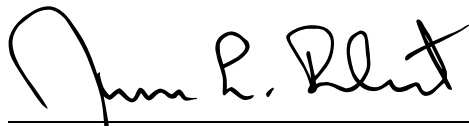
25 <sup>5</sup>Whether neglect is excusable is an equitable determination that depends on at least  
 26 four factors: “(1) the danger of prejudice to the opposing party; (2) the length of the delay  
 27 and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the  
 28 movant acted in good faith.” Bateman v. U.S. Postal Serv., 231 F.3d 1220, 1223-24 (9th  
 Cir. 2000).

1 with mere inadvertence by plaintiff's counsel, fails to constitute good cause for a delay in  
2 service. Wei v. Hawaii, 763 F.2d 370, 372 (9th Cir. 1985). Likewise, unfamiliarity with  
3 local rules does not generally constitute excusable neglect. Comm. for Idaho's High  
4 Desert v. Yost, 92 F.3d 814, 824 (9th Cir. 1996). Washington courts strictly interpret the  
5 90-day requirement and do not consider it to mean three calendar months. See Derendy  
6 v. Kumbera, 726 P.2d 34, 35 (Wash. Ct. App. 1986) (rejecting plaintiff's argument that  
7 "90 days" means "three calendar months" and finding "our Supreme Court has counted  
8 90 days as 90 days."). Thus, the court finds that Plaintiff's explanation for the delay in  
9 effecting service fails to constitute excusable neglect under Fed. R. Civ. P. 6(b), and  
10 DENIES Plaintiff's motion to enlarge time.  
11

#### 12 IV. CONCLUSION

13 For the reasons stated above, the court GRANTS Defendants' motion for judgment  
14 on the pleadings (Dkt. # 11) and DENIES Plaintiff's motion to enlarge time (Dkt. # 15).  
15 Accordingly, the clerk is directed to enter judgment in favor of Defendants due to  
16 Plaintiff's failure to initiate legal action before the statute of limitations expired.  
17

18 Dated this 8th day of July, 2005.

19  
20  
21 

22 JAMES L. ROBART  
23 United States District Judge  
24  
25  
26  
27  
28